

IN THE
United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT. 132

Francis M. Townsend, Milon J.
Trumble and Alfred J. Gutzler, do-
ing business under the firm of
Trumble Gas Trap Co.,

Appellants,

vs.

Lorraine Corporation, a corporation,

Appellee.

APPELLEE'S RESPONSE TO APPELLANTS'
REPLY BRIEF.

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Because of outrageously question-begging assumptions and misleading statements of fact in Appellant's Reply Brief, we have asked and there has been granted to us by Your Honors the right to file this reply:

One of the most glaring and inexcusable of direct misrepresentations is that contained in the bottom of page 9 of Appellants' Reply Brief where counsel assert in italics that it is not true that this case involves only two traps out of thousands. This italicized statement, however, is immediately shown to be without foundation by careful study of the text immediately following which shows only that plaintiff *suspects* that defendant may continue to

make other traps like the two questioned. Counsel admit that an accounting will take care of the two traps; but seek the injunction solely because of a *mere possibility* that defendant will make others like them. *There is not a scrap of evidence to support such possibility*, which, even if it exists, would not warrant any inference of irreparable injury; on the contrary circumstances most cogent militate conclusively against the possibility that defendant will continue to make any more like the two traps finally, after much hesitation, settled upon to support the charge; thus, in the first place, it is admitted that defendant made millions of dollars worth of traps (including the four of the six withdrawn from the charge) *which did not infringe*. The four traps first relied upon, but finally admitted by counsel not to be infringements, are very similar to those finally relied upon.

When defendant has demonstrated that the alleged Trumble invention amounted to so little that he could build up what is conceded to be the largest business in the world in the sale of traps *which admittedly did not contain it*, is it reasonable to suspect that defendant will make any great number of the form now questioned, until this controversy is decided?

But we seem to hear the court asking: Why so earnestly resist an injunction limited to only two forms of traps when it appears so easy for defendant to avoid even a question of infringement by confining operations to the many-formed admittedly not infringements.

We answer by a similar inquiry: Why insist upon an intrinsically worthless injunction—one so limited that de-

defendant's business is in no manner apparently interrupted by it?

Here is the answer to both questions: Any kind of an injunction will injure the good-will of defendant and will correspondingly enure to the business advantage of plaintiff. The scope will not be understood—will be easily misrepresented. Plaintiff may be required by some purchasers to give bond to protect them from a charge of infringement by plaintiffs, *even in the case of traps clearly and admittedly not infringements*. The trifling amount of infringement, the concealed nature of the alleged infringement inside of trap, all these facts point—not to irreparable injury to plaintiff upon failure to grant an injunction but to irreparable injury to defendant if such injunction be granted. The mere fact that the court has found something to enjoin is enough for some purchasers. The result is that many purchasers will require security against infringement and this greatly burdens defendant and gives plaintiff a corresponding advantage in the selling field in a closely competing business.

On the other hand if an injunction is denied these devices being large and costly contrivances can be easily kept track of on any possible accounting and thus full justice be done to plaintiff.

The alleged infringement actually relied upon is too small for the dignity of the court, and there is positively no evidence of any intention on the part of defendant to continue to make the forms in question, even assuming that they infringe.

As showing how far plaintiffs will go in groundless proceedings for the purpose of business advantage: We

have in our Opening Brief referred to Model 16 of Lorraine which on contempt proceedings before Judge Bledsoe was charged to be an infringement, and, consequently, a violation of the previous injunction. The charge was simply outrageous. In order that the court may see this in the light of the present record let Your Honors look at the drawing of this device shown forth from the right-hand side of the photostat page in the back of appellants' brief.

In this Model 16 the oil inlet is marked on the drawing. The pipe which extends into the separator into a closed box or receptacle in the bottom of which is a screen with 57 holes in it. There was no possibility of the spreading of anything on any surface. The oil falls in a solid stream from the opening in the bottom inlet pipe as shown in the drawing and upon striking the screen was splashed and broken up into many drops and streamlets; yet the matter was held in court for a long time while plaintiffs made as much capital as possible out of its pendency.

In the middle of page 18 Appellants' Reply Brief it is said:

“It is passing strange if there be no advantage in the imperforate spreading surface or cone appellee has not adopted a perforated surface having the function and mode of operation of the Bray cones. No liability for infringement could possibly be incurred thereby if appellee adopted the Bray principle and relation of parts.”

The action of the plaintiffs in charging contempt in the use of Model 16 belies such statement and shows conclusively that plaintiffs are willing to charge infringement by any kind of device, regardless of consistency, merely for

the purpose of litigation, and with the hope of confusing the court and thus securing a grossly erroneous decision.

It is true that the court will enjoin misuse of its process; but it is quite difficult, uncertain, and cumbersome to prove such things and the court is often powerless to control a grievous injustice caused by the prosecution of a groundless suit. The courts are often used purely for business-getting purposes and we submit that this is one of the clearest of those cases.

It is most emphatically not true as stated in the first line of Appellants' Reply Brief that the only substantial question involved in this appeal is—has the lower court correctly interpreted and properly applied the decision of this court (290 Fed. 54) in the previous case?

There are several other very vital issues not involving the correctness of the trial court's said interpretation, which cannot be ignored without disregarding settled law relating to appeals in preliminary injunction matters.

It is true that the court below in interpreting the decision was most positive in its finding of non-infringement, even without the further and more certain evidence which could be presented in an orderly trial. It is not true that *all* the evidence is before the court that can be and will be before the court on the issue of infringement on any regular trial of this case. Any decision this court may make will be based upon *ex-parte* affidavits, and one of the most important of those affidavits is that of plaintiffs' expert, Hackstaff, four-sixths of whose testimony is admitted by plaintiff to be incorrect by the withdrawal of the charge of infringement as to four of the traps origi-

nally relied upon. We have had no opportunity to cross-examine Mr. Hackstaff, and cross-examination might compel admissions which might make obviously untenable his position as to infringement as to the only two traps before the court, and thus conclusively prove non-infringement by the admission of plaintiff's own expert.

There is no ground for any assumption that *all* the evidence is before the court on this issue of infringement. On the contrary on the trial we have a right to produce and will produce other evidence to explode any new theory of infringement that may have been developed in the present argument. For instance, evidence of utility is often of the greatest importance on questions of infringement. (Walker on Patents, Sixth Edition, Section 432.) If this case should go to trial upon mere affirmance, without passing upon the issue of infringement presented in the present case, we are prepared to prove conclusively that there is no real utility in plugging the holes in Bray's cones in the alleged Trumble invention. *The very fact that defendant's Model 16 trap upon which the oil fell in a solid stream on a screen was contended to embody the Trumble invention and was shown to be more efficient than Trumble demonstrates want of utility of a solid cone over a screen with 57 holes in it.* Incidentally also it admits that the Trumble patent is anticipated by such devices as that of Bray, because it makes immaterial any difference between Trumble and Bray.

Counsel in the middle of page 5 of Plaintiff's Reply Brief refers to a *step by step encroachment* upon the Trumble patent. There is no evidence of any such "step

by step encroachment”—it is purely an assumption unsupported by even an explanation of what particular traps are found in this alleged step by step infringement.

The alleged closer and closer approximation of the Trumble invention is again referred to at the top of page 6 of Appellants' Reply Brief without any evidence whatsoever of any such progressive imitation. As a matter of fact the alleged infringement and that of Trumble are in form and effect as different as they can possibly be.

Most certainly the parties are not in accord as set forth in a statement in Appellants' Reply Brief at page 7, that no other subsequent testimony is available on the issue of infringement. We heretofore pointed out that we have a right to introduce any number of patents, prior uses, or publications, to show the state of the art on the trial, none of which are before the court at this time. We have a right in view of the wide discretion of the trial court, even if there was any possible doubt as to defendant's non-infringement in the present case, to have an opportunity by an orderly trial to present such evidence.

We have fully in appellants' brief anticipated any theory of *res adjudicata* against this defendant.

At the bottom of page 10 said Reply Brief counsel admit that it is impossible to know what is the construction of the inside of the trap without partially dismantling and crawling inside of the trap. This being so and all these traps being alike in appearance, how can plaintiff possibly be irreparably injured by their sale, when there is no notice or knowledge in or by the purchaser of the use of any such alleged invention within them?

At page 11 Appellant's Reply Brief, counsel to the absurdity of contending that the decree in the former suit is *res adjudicata* against this defendant, but that plaintiff may file an original bill presenting all the usual issues of validity in a patent suit, the defendant being ordered by subpoena to answer such bill, but that *upon raising the issue as required by the subpoena* evidence may not be considered. The contention is too absurd for an answer.

It is not true that defendant Lorraine Corporation participated in any manner in prior litigation as suggested on page 14 of Appellants' Reply Brief. The litigation was pending three years yet no attempt was made to join this defendant. It is clearly not bound by any such decree. The filing of a new suit raising the usual issues is in itself an admission of this fact. A most inexcusable and vitally misleading statement is found at the bottom of page 17 of Appellant's Reply Brief to the effect that defendant had evidence to prove that more than one trap like Towner No. 3 had been made. This is a brazen assertion by counsel unsupported by any evidence in the record. The accounting proceedings languished long, yet no such proof was ever suggested. Mr. Lorraine's testimony stands uncontroverted of record that there was only one such trap.

At page 19 of Appellant's Reply Brief counsel refer to Exhibit A 5 and A 6 and assume that the inside spirally arranged covered trough is "an expansion chamber." It is not an expansion chamber but merely an oil inlet pipe extended to the interior of the trap. There is obviously nothing in the Trumble device having any function or

effect at all analogous to this covered trough. It cannot be an expansion chamber because there is no gas discharge outlet in it. All the oil and gas must leave at the discharge outlet before any effective separation takes place. This is not true in the Trumble device as all the oil and gas is immediately discharged into a chamber where separation takes place.

Respectfully submitted,

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